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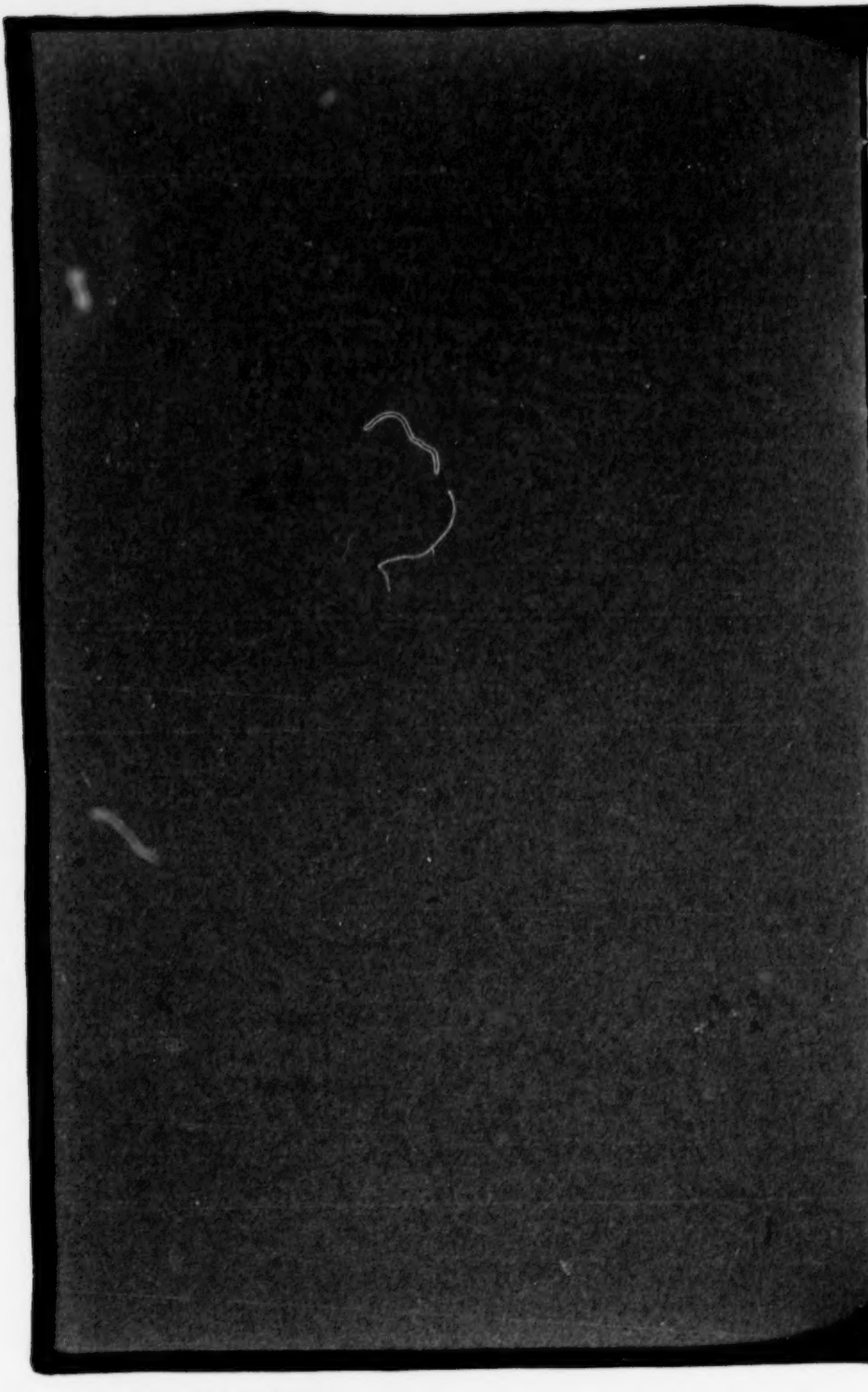

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SUPREME COURT OF THE STATE OF COLORADO

No. 15343

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,
Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,
Defendant in Error

Error to the District Court in and for the City and County of Denver

Honorable HENRY A. HICKS, *Judge*

ON APPLICATION FOR ALLOWANCE OF AN APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY DEFENDANT IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF COLORADO AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to paragraph 1, Rule 12 of the Supreme Court of the United States, Defendant in Error-Appellant presents and files this its statement particularly disclosing the

basis upon which it is contended by it that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Colorado desired to be appealed from:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 937; Judicial Code, Section 237; 28 U. S. C. A., Section 344), which provides that:

> "A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had, * * * where is drawn in question the validity of any statute of any state on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court and may, in its discretion, award execution or remand the cause to the court from which it was removed by writ. * * * "

As amended by the Act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c. 440, 45 Stat. 466 (28 U. S. C. A., Secs. 861-A and 861-B) which respectively provide:

> Section 861-A:
>
> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Section 861-B:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of revoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B

Statute of the State of Colorado, the Validity of Which Is Involved

The statute of the State of Colorado, the validity of which is involved, is a pretended Order of the Board of Water Commissioners of the City and County of Denver, State of Colorado, in favor of the validity of which the Supreme Court of Colorado has decided, and that consists of three certain letters that were construed and applied by the opinion and decision of said Court as constituting a valid order, law or statute of the State of Colorado, which was drawn in question by the City on the ground of its repugnancy to the United States Constitution, and which are in words and figures, as follows:

"EXHIBIT C

November 24, 1930.

Kountze Brothers,
New York City, N. Y.

GENTLEMEN:

We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds, Series 1927, due December 1st, have not been forwarded to you, as per your letter of August 3rd, 1927, 15 days prior to the interest paying date.

We are sorry this instalment was overlooked and will assure you that in the future the funds will be there in proper time.

Very truly yours,

BOARD OF WATER COMMISSIONERS

GFH

Assistant Manager"

GFH.

(Record page 63, folio 240.)

"EXHIBIT D

Commissioners: A. P. Gumlick, W. H. Leonard, Fred'k R. Ross, Richard Wensley.

Officers: W. H. Leonard, President; Fred'k R. Ross, Vice Pres.; A. P. Gumlick, Vice Pres.; C. C. Schrepferman, Mgr.; Hiram E. Hiltz, Sec.-Treas.

CITY AND COUNTY OF DENVER BOARD OF WATER COMMISSIONERS

1509 Cleveland Place

Telephone—Tabor 8211

November 24, 1930.

Hon. Clem W. Collins,
City Treasurer,
Denver, Colorado

DEAR SIR:

We are enclosing a copy of a letter from Kountze Brothers dated August 3rd, 1927, relative to the payment of interest on Denver Municipal Refunding Water Bonds, Series 1927, and also a copy of a letter we are this day writing to them.

Will you please be governed accordingly?

Very truly yours,

BOARD OF WATER COMMISSIONERS,
G. F. HUGHES,
Assistant Manager."

GFH/oab.

(Record page 64, folio 241.)

"EXHIBIT E

KOUNTZE BROTHERS

New York, August 3, 1927.

Mr. Hiram E. Hilts,
Sec'y of the Board of Water Commissioners,
City of Denver, Colorado.

DEAR SIR:

We are advised by our valued correspondents, the Colorado National Bank of Denver, that you contemplate a refunding issue of Water Bonds to the extent of about $14,000,000.00.

We shall be very pleased indeed to have our firm named as fiscal agents for the payment of the interest on these bonds in New York, for which service we will name the same terms under which we are now acting in a similar capacity for the City and County of Denver, Colorado; that is, if funds to pay this interest are placed with us fifteen days prior to the maturity of the coupons, we will make no commission charge for paying these obligations.

Trusting these terms will prove entirely satisfactory, and awaiting your further advices concerning the particulars of the issue in question, we remain

Yours truly,

KOUNTZE BROS."

(Record page 65, folio 242.)

C

Date of Judgment Sought to Be Revised and Date of Presentation of Application for Appeal

The judgment of the Supreme Court of Colorado desired to be appealed from was entered on the 26th day of November, 1945, and the application for appeal is presented and filed this 20th day of February, 1946.

D

Nature of Case

(Herein the plaintiffs in error will be referred to as "McGlone" and the "Company," and defendant in error as the "City.")

This is a civil action wherein the City, a municipal corporation of the State of Colorado, sued McGlone and the Company for damages in the sum of $25,997.50, with interest, for the breach of an official bond executed by them to secure the faithful and prompt performance by McGlone of his official duties as Manager of Revenue, ex-officio Treasurer of said city (Record pages 1-4, folios 1-11).

Said bond is the general bond of said McGlone as such Manager of Revenue, ex-officio Treasurer, and was executed in pursuance of and in literal compliance with Section 57 (Sec. 105 of the 1927 Edition) of the City Charter, which provides:

> "Bond-Surety Company—Cost paid by city
>
> (Section 57) The treasurer shall give a bond to the city and county with sufficient sureties, which sureties shall be responsible surety companies, to be approved by the mayor and council, in the sum of five hundred thousand dollars, and for such additional sum as the mayor and council shall require, conditioned as required by the general statutes relating to bonds of county treasurers and as may be further required by ordinance, and for paying over to his successor in office all such sums of money belonging to the city and county as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever, and all city and county property which may come to his hands.
>
> The cost of said bond shall be borne by the city and county, to be audited, allowed and paid out of the

treasury as provided for the payment of other general expenses.

(Charter, March 29, 1904.)"

(Record pages ——, folios ——.)

The breaches of said bond that are alleged in the complaint are that:

(a) "Said McGlone in breach of the terms and conditions of his said bond converted" said sum of $25,997.50 "to his own use"; and

(b) "That said McGlone has failed and refused and still fails and refuses to account for said sum of money or any part thereof, or to pay or deliver over the same to his successor in office or to any other person or persons authorized by law to received the same."

(Record pages 3, folios 7-9.)

In their answer said defendants admitted that McGlone had during his term of office received various sums aggregating said sum of $25,997.50, but denied having converted that or any other sum to his own use (record pages 7-14, folios 7-17); admitted that, following the same procedure as had been followed by his predecessor in office, and in manner and form as directed by the Board of Water Commissioners of said city, he had remitted said moneys to Kountze Brothers Bank in New York to cover and pay certain coupons on municipal water bonds; that the Banking House of Kountze Brothers in New York City failed and closed; that there was at the time of the closing of said bank an insufficient amount of money in each coupon account to cover coupons overdue, much less those maturing thereafter, and which the defendant had reason to believe would be presented to said Kountze Brothers for payment; and that the balances in said bank were not applied to the pay-

ment of coupons or returned due to the failure of said Kountze Brothers Bank (record pages 18-21; 79, folios 30-38; 207).

The only defenses that said defendants even pretended to make to the allegations of the complaint in said cause were that pursuant to Section 264D (297B of the 1927 Edition) of the City Charter, a Board of Water Commissioners was created which had and has complete charge and control of a municipal water works system and plant for supplying the city and its inhabitants with water for all uses and purposes; that payment of the indebtedness evidenced by certain bonds mentioned in said answers, and interest thereon, and the cost of operation and maintenance of said system and plant and all additions, extensions and betterments thereto, have at all times been and now are made from revenues received from the operation of said system and plant by said board, and that the revenues so received from the operation of said system and plant were turned over to the Treasurer of said City and County pursuant to Section 264 D (Section 297 B of the 1927 Edition) of the Charter, and by said Treasurer placed in a separate account or accounts constituting the water works funds hereinbefore mentioned (Record pages 15-16, folios 20-23); that in pursuance of the Charter of the City its Council had in three certain ordinances submitted to the taxpaying electors thereof for their approval, the question of issuing negotiable interest bearing bonds as follows:

> "First—for the acquisition of a new municipal water plant
>
> Second—for the purpose of supplying the City with water; and
>
> Third—for the purpose of refunding certain outstanding bonds described as City and County of Denver Municipal Water Bonds;"

that said ordinances respectively provided that the Council should by subsequent ordinances prescribe the form of the bonds and authorize the issue, if the issue should be ratified by the properly qualified taxpaying electors; that they were so duly authorized and said bonds were duly issued; that the principal and interest of said bonds were by said ordinances respectively made "payable AT the said Banking House of Kountze Brothers, in the City of New York, or AT the office of the Treasurer of the City or County of Denver at the option of the bondholders and the bonds and interest coupons themselves so provided" (Record pages 28-30, folios 61-67).

In addition to the foregoing admissions, denials and allegations that were contained in the first and second defenses of the answer of McGlone, and that were in substance adopted by the Company, its answer contained in substance the following:

Pursuant to Section 264 D (297 B of the 1927 Edition) of the City Charter, the Board of Water Commissioners required McGlone, as treasurer or custodian of the water works fund and the revenue received by the Board of Water Commissioners from the operation of the water plant and system, to give a SPECIAL bond conditioned in the manner determnied by said board; that McGlone as principal, and Fidelity & Deposit Company of Maryland, as surety, made, executed and delivered to the city their bond or obligation in writing, a copy of which was attached to and made by reference a part of said answer, marked Exhibit A (Record pages 56-57, folios 144-145).

That said bond was required and given pursuant to Section 264 D of the Charter as a SPECIAL bond to cover the moneys in the water works fund; the items referred to and included in the plaintiff's complaint were each and all water works funds and relate solely to the bonds issued by the

City for the purchase and on account of said water works system and plant and its operation, maintenance and the additions, extensions and betterments thereto; that the bond of the defendant Continental Casualty Company, sued upon herein, is, and is intended to be, a general bond covering the defendant McGlone as Treasurer of the City and County of Denver, but *not as Treasurer of the Water Board,* and the items of water bond coupon accounts are not covered by and were not intended to be covered by the said bond (Record page 57, folio 147).

That the City had elected to and made demand on said special bond and brought suit thereon against said Fidelity & Deposit Company of Maryland and said McGlone, which suit was then pending in the District Court of said City and County of Denver (R. p. 58; F. 148).

That if it shall be determined that the defendant Continental Casualty Company is liable for the payment of said items of water bond coupon accounts the said Continental Casualty Company is entitled to become and be subrogated to the rights of the City on the special bond of Fidelity & Deposit Company of Maryland and in the suit pending therein (R. p. 58 F. 150).

That if in said suit it shall be determined that said Fidelity & Deposit Company of Maryland is liable for the payment of said items and judgment therefor be decreed and satisfaction be had by the City, no liability would exist on the bond of or against the defendant Continental Casualty Company herein for said items and this action should be abated and denied prosecution pending determination of said cause against said Fidelity & Deposit Company of Maryland (Record page 59, folio 152).

Thereafter, by leave of Court first had and obtained, both of said defendants—McGlone and the Company—filed supplemental answers in which they alleged, in substance,

that the City for a valuable consideration, in a transaction in which the defendant Continental Casualty Company was not a party, had released and discharged McGlone and Fidelity & Deposit Company of Maryland and that said suit against them had been settled; that the claim or claims in that suit were the same and identical claims made by plaintiff in its complaint herein; that said Fidelity & Deposit Company had brought suit against the Continental Casualty Company upon the same claims and demand as are alleged and made by the plaintiff against said Company herein, and reiterated the allegation that "the bond of the defendant Continental Casualty Company is, and is intended to be, a general bond covering the defendant McGlone as Treasurer of the City and County of Denver, but not as Treasurer of said water board, and said items of water bond coupon accounts are not covered by and were not intended to be covered by said general bond" (Record pages 64-65, 68-86, folios 166-172, 176-183).

The City filed motions to strike all of the defenses so alleged excepting such parts thereof as admitted material allegations contained in the complaint. When said motions were set and came on for hearing the attorney appearing for said defendants suggested that said causes be tried upon an agreed statement of facts which he offered to prepare and submit to the attorney for the City for approval within one week. The hearing was continued for that reason. Said attorney having failed in that respect for a period of more than one year, said motions were reset for hearing, but no such proposed "agreed statement of facts" was submitted to the attorney for the City until said motions came on for hearing in open court. At that time said attorney for defendants for the first time presented to the attorney for the City for his examination and approval the instrument that appears at pages 73-86, folios

188-227, of the record, and which, as said record shows, is a substantial reiteration of facts alleged in said answers, with the exception that the defenses of release and discharge and for subrogation set forth in said supplemental answers were dropped out, evidently on account of the provisions of Sections 4, 5 and 6, Chapter 92, Colorado Stat. Ann. 1935, which so plainly justified the compromise and settlement of the action against McGlone and Fidelity & Deposit Company of Maryland and support both the right of that company to contribution against the Continental Casualty Company and the right of the City to an affirmance of the judgment of the Trial Court in this case.

Thereupon the attorney for the City refused to sign or agree to said proposed statement of facts as the same was proposed, and the record plainly shows the following as respects the only issues of fact and of law that were actually presented in said cause for decision:

(1) That the defendants submitted an instrument entitled "Agreed Statement of Facts," which, as proposed, the City refused to agree to or sign; that thereupon the defendants submitted the same as a basis for trial and offered to prove the facts objected to and for the Court to reserve its rulings; at the request of counsel for the defendants the case was proceeded with upon the distinct understanding that it should be tried on said statement irrespective of signature, subject to the objections of counsel for the City to any facts stated therein and ruling would be reserved; that the City objected to parts of paragraphs 12 and 12A and to all of paragraphs 24, 25 and 31 of said instrument, "on the grounds of immateriality and irrelevancy and in part as mere conclusions"; that the Court received said instrument in evidence subject to said understanding, and necessarily sustained said objections when, after being

fully advised, it gave judgment for the plaintiff for the full amount of principal and interest called for by its complaint.

(2) That the only issue presented in said cause for decision is according to the language of the defendants in paragraph 8 of said instrument, as follows:

> "The plaintiff claims in this suit that defendant McGlone as principal and the defendant Continental Casualty Company as surety are jointly and severally liable to it for the payment or reimbursement of the sums deposited in Kountze Brothers Bank and not recovered in the bankruptcy proceedings, but the defendants deny liability and this suit is upon the issue of the liability so claimed and denied."
> (Record page 75, folio 195.)

(3) That the defendants admitted that said McGlone deposited said moneys in said bank and that because of the failure thereof said moneys were lost and not returned or paid over to his successor in office.

(4) That apart from said admissions the only pretended defenses to said action that defendants undertook to plead were that the said bond was required and given pursuant to Section 264D (297 B of the 1927 Edition) of the municipal Charter of the City and County of Denver, as a special bond to cover the moneys in the water works fund; that the items referred to and included in the plaintiff's complaint and bill of particulars as water bonds, coupon account 1914, 1923 and 1927, were each and all water works funds and related solely to the bonds issued by the City and that as alleged in Paragraph X of McGlone's answer and in Paragraph 24 of said so-called "Agreed Statement of Facts" that was objected to by the City, "the Board of Water Commissioners prior to the transmittal of the moneys involved in this suit authorized and directed the Department of Revenue ex-officio Treasurer and also directed the Manager

of Revenue to transmit said moneys to the said Kountze Brothers Banking House AT New York to take care of the payment of all the bond interest coupons that might be there presented and the said moneys were transmitted by the defendant McGlone and his predecessors in obedience to the orders and directions of the Board of Water Commissioners and all of the transmittals were made according to the orders and direction and according to the Charter and Ordinance provisions of the City and County of Denver" (R. p. 31 & 82; F. 68 & 216).

Such were the clearly stated and only questions that were ever at any time presented for decision in this case. We, therefore, respectfully submit that thus it so affirmatively appears on the face of this record that apart from an admission of every material fact essential to a judgment for all that was asked for in the complaint, the only issues presented by McGlone and the Company with respect to their claim of non-liability upon this general official bond are that the Board of Water Commissioners acting in pursuance of Section 264 D (297B of the 1927 Edition) of the municipal Charter required said McGlone, as treasurer or custodian of the water works fund and revenues received by said board from the operation of the water works plant and system, to give a special bond conditioned in the manner determined by said board; when the unambiguous words of said section of the Charter only authorize said board to require and mandatorially require that "the treasurer SHALL give such ADDITIONAL bond conditioned in such manner as shall be determined by the board, the premium therefor to be paid out of the water works fund" (Append. Ex. C, page 61).

Searcy v. *Cullman County*, 196 Ala. 287; 71 So. 664;
State v. *Sparks*, 109 W. Va., 394; 155 S. E. 172;
City of Cudahy v. *Firer*, 215 Wis. 607; 255 N. W. 904;

Trustees etc. v. *McBride,* 221 N. Y. 231; 4 A. L. R. 1431;
Evans v. *Illinois Surety Co.,* 220 Ill. App. 216;
Holland as Governor v. *American Surety Co.,* Fla. 6 So. 2 D 280; 140 A. L. R. 1451 and note; 50 C. J. 155, Sec. 255;
Stearns Suretyship, 135;
5 Crouch on Insurance 4382, Note 23.

That the bond upon which this action is bottomed is intended to be a general bond covering the defendant McGlone as Treasurer of the City but not as TREASURER OF THE WATER BOARD (Record pages 66 & 170, folios 170 & 180); that said defendants were not liable on said bond for the reason that if any liability for the loss of said moneys existed at all that liability was on the so-called SPECIAL bond executed as required by said Board to the City by McGlone and Fidelity & Deposit Company of Maryland (Record pages ——, folios ——), but that there was no liability even on that bond because said Board prior to the transmittal of the moneys involved in this action duly authorized, ordered and directed the Department of Revenue and also directed the Manager of Revenue, ex-officio Treasurer to transmit said moneys to Kountze Brothers Banking House aforesaid AT New York to take care of the PAYMENT of all of said coupons, also the bonds aforesaid that would be there presented —and that the defendant McGlone "is informed and believes and upon such information and belief alleges that the aforesaid various accounts on the books of Kountze Brothers were opened and maintained by said Kountze Brothers at the direction of said Board of Water Commissioners" (Record pages 31 & 82, folios 68-70; 216).

It is, therefore, apparent on the face of this record that said defendants' alleged defenses and only contentions were that in the handling of the City's water works funds said McGlone was the treasurer of the Water Board and not of

the City, the party to whom both of said bonds were executed, and that there was no liability for the deposit of said moneys in Kountze Brothers Bank and their consequent loss to the City simply and only because said McGlone, being the Treasurer of said Board in handling said water works funds, was for that reason, subject to said Board's orders; so that, the only real issues in any manner presented for decision in said cause is whether McGlone was the Treasurer of the City or the Treasurer of the Board of Water Commissioners, and whether, under the City Charter, the exclusive control of the City's moneys was vested in McGlone as City Treasurer or whether, as regards said water works funds, he was Treasurer of said Board and subject to its orders as his "superior officers."

WHEREFORE we ask and answer in the following manner the questions: Did the Supreme Court of Colorado in its opinion in this case actually decide the issues that were presented to it for decision, or did it hand down an opinion upon which the decision and judgment herein were made to turn upon an issue that was never in any manner presented for decision? And in so doing, was or was not said decision in favor of the validity of a pretended order, law or statute enacted by the Board of Water Commissioners of the City and County of Denver, State of Colorado, which was drawn in question by said City on the ground of its being repugnant to the Constitution of the United States?

We are compelled by the record herein to submit that said opinion was not only based and made to turn upon an issue that was not in any manner presented for decision; that it was in favor of the validity of such an order that was so drawn in question; and that it consists only of an admixture of statements that are diametrically opposite to what the record actually shows and that cover the real issues that were presented for decision underneath a gauze-like

film of non-committal comments that make no mention whatever of the real issues, and constitute such an obvious evasion of such issues that for us, to say the least, it stands for cause for all to whose attention it might be called a lurking sense of dark foreboding fear and for all who reverence righteous judgment—crucifixion upon a cross of sorrow and of shame.

So we ask and shall endeavor to make plain our reasons for asking, the question: "Can it be said that such a significant opinion—'be forgiven for what it would do?'" in introducing to this Court the

E

Rulings of the Supreme Court of Colorado

For the purpose of making certain that the rulings of said Court shall be clearly stated, especial attention is called to the following that appears on the face of the opinion of the Supreme Court of the State of Colorado as it appears in this case:

FIRST: "The facts, AGREED UPON BY STIPULATION BETWEEN THE PARTIES, include the following." After having stated certain of the facts alleged in the answers and set forth in said so-called "Agreed Statement of Facts" that were not denied by the City, said opinion further states:

"It is further stipulated that" and proceeds to quote paragraph 24 of said so-called "Agreed Statement of Facts" as if the City had agreed to that paragraph, when the record plainly shows the contrary, and that it was specifically objected to on the ground of immateriality and irrelevancy (Record pages 98-101; 104; folios 246-247; 251-262).

SECOND: Said opinion calls attention to the separate action against McGlone and Fidelity & Deposit Company of

Maryland on the supplemental bond, which it actually says covered "the official duties of McGlone as treasurer or custodian of the water works fund" as if said funds were not the moneys of the City and in his receipt, custody and control thereof McGlone had exercised the duties of an office other than that of Manager of Revenue, ex-officio Treasurer of the City; and having called attention to the fact that "that proceeding appears to have been dismissed with prejudice" said opinion again proceeds to quote from paragraph 10 of the so-called "Agreed Statement of Facts" which was not agreed, but objected to by the City and abandoned by the defendants, and then calls attention to the supplemental answers wherein defendants pleaded the settlement and release of Fidelity & Deposit Company of Maryland and asked that this cause be dismissed, which was likewise objected to by the City and abandoned by the defendants (R. p. 101-104; 83 F. 251-262; 217; 226-227; 262).

THIRD: Departing from the issues presented for decision, said opinion proceeds to base its decision of said case squarely upon the following grounds:

> "The record shows, however, that Denver entered into a CONTRACT with Kountze Bros. whereby the latter would act as PAYING AGENT in New York City for Denver in respect to the three bond issues. The consideration for Kountze Bros. so acting was that Denver would deposit with them the sums necessary to pay the interest coupons which it was estimated would be presented for payment in New York City at least fifteen days in advance of the due date of the particular interest coupons, payment of which was being provided for by the remittance."

"The record further shows that the following letter from the Denver Board of Water Commissioners under date of

November 24, 1930, was sent to Kountze Bros. in New York City:

> 'We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds Series 1927, due December 1 have not been forwarded to you as per your letter of August 3, 1927, fifteen days prior to the interest paying date.
>
> 'We are sorry this instalment was overlooked and will assure you that in the future the funds will be there in proper time.' "

(The record, page 92 F. 40 shows that this letter was signed "Board of Water Commissioners, G. F. H. Assistant Manager.")

> "Under the same date the Board wrote to the then City Treasurer, defendant McGlone's immediate predecessor in office, as follows:
>
> 'We are enclosing a copy of a letter from Kountze Brothers dated August 3, 1927 (CONTAINING THE CONTRACT ARRANGEMENTS ALREADY DESCRIBED) relative to the payment of interest on Denver Municipal Refunding Water Bonds, Series 1927 and also a copy of a letter we are this day writing to them.
>
> 'Will you kindly be governed accordingly.' "

(The record, page 93 F. 241 shows that this letter was signed "Board of Water Commissioners, G. F. Hughes, Assistant Manager.")

> "When McGlone took office, therefore, he was not merely following 'the course of conduct which had been followed prior to his induction into office' in the sense that he was following an inchoate habit which he could have changed had he desired not to take the line of least resistance. He liked his predecessor made remittance to Kountze Bros. because he found instructions from the Denver Board of Water Commissioners directing his office to make the remittances in accordance with the terms of an agreement made with the New York Banking House * * *.

> "In this case the City was under valid obligation to the bondholders to pay the bond interest either in Denver, Colorado, or at Kountze Bros. in New York City, at the option of the bondholders. It was further under obligation to Kountze Bros. to make remittance to cover the estimated presentation of interest coupons for payment in New York City at least fifteen days before the due date of the coupons * * *. Finally the Treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners to make the remittances to Kountze Bros. in such a manner as to comply with the City's contract with that Banking House."

All of this being squarely in contradiction of the facts plainly appearing on the face of the record, which shows as follows:

(1) That apart from the offer of the defendants to prove that paragraphs and parts of paragraphs of the so-called "Agreed Statement of Facts," to which the City refused to agree and objected on the ground of their "immateriality and irrelevancy," there was not one scintilla of evidence offered in the case or contained in the record to which the foregoing statements in said opinion could have reference, other than the three letters to which it refers; and these letters simply show that on August 3, 1927 Kountze Brothers addressed Exhibit E to "Hiram Hilts, Secretary Board of Water Commissioners, City of Denver, Colorado," in which they request that they be named as "fiscal agents for the PAYMENT of the interest on said bonds," and in which they said, "If funds to pay this interest are placed with us 15 days prior to the maturity of the coupons we will make no commission charge for paying these obligations."

Therefore, instead of said letter of August 3, 1927 being a contract, as stated on the face of said opinion, it constituted only an offer to act as "fiscal agent" and: the term

"fiscal agent" does not mean a depository of public funds, but refers to "fiscal duties" of "an officer within the official limits defined by law."

Baldwin v. *Dubuclet*, 27 La. Ann. 29, 33;
Folger v. *U. S.*, 13 Ct. Cl. 86, 92.

(2) Thereafter on November 24, 1930, the two letters quoted in said opinion (Record Ex. C. & D., pages 92-93) were sent to Kountze Brothers and Clem W. Collins, the predecessor of McGlone, in the name of the Board of Water Commissioners, by its Assistant Manager, as shown by Exhibits C and D (Record, pages 92-3 F. 240-241).

So that not only does the record plainly show that the pretended order of said Board to which said opinion refers and which it decides to be a contract and "valid obligation" that bound the City and McGlone to deposit said lost funds in the Kountze Brothers Bank, consists of nothing else than said letters, and that the only intimation of any evidence even of such a pretended order of said Board to McGlone to "transmit said moneys to Kountze Bros. to take care of the payment of all bond interest coupons that might be there presented" was made to his predecessor in office, and that, when testimony with respect to that allegation was offered, the City objected to it on the ground of its immateriality and irrelevancy (Record, page 104, folio 262). Nevertheless, squarely in the face of that showing said opinion actually says:

> "It is not contended that the order of the Board of Water Commissioners directing the City Treasurer to make the remittances was ultra vires, nor is it argued that the financial arrangement between the Board and Kountze Bros. was either ultra vires or illegal,"

when said Section 264 D (297 B of the 1927 Edition) of the Municipal Charter of which said Court was in duty bound to take judicial notice, expressly provides as follows:

> "The Board • • • shall daily turn over to the Treasurer of said City and County all money received.
>
> "The Treasurer of the City and County of Denver shall open and keep a separate account for said water works fund into which shall be placed all revenues received from the operation of the water works system and plant, together with all moneys coming into said fund from other sources and enter therein all receipts and disbursements on account thereof and money shall be paid out of said fund only upon warrants of the Board audited by the auditor of the City and County of Denver EXCEPT as to the bonds and the interest thereon which the Treasurer SHALL PAY without warrant or order."

And the record plainly shows that the City did object to all evidence respecting said pretended order of said Board on the ground of its "immateriality and irrelevancy" and that the Trial Court necessarily sustained those objections when it gave judgment to the City for everything it asked for in its complaint (Record, pages 104-105, 106; folios 262-264; 287).

FOURTH: Said opinion further says:

> "The Treasurer in turn was not merely authorized, but directed by ordinance of the City Council to pay both the principal of the bonds and also the interest coupons—(leaving out "at the Banking House of Kountze Bros. in New York City," etc.)—and unlike other payments—was expressly relieved of the necessity of obtaining warrants therefor." (App. Ex. A, page 55.)

when the provisions of said ordinances and said bonds positively required the PAYMENT of said bonds and in-

terest coupons to be made AT Kountze Brothers Banking House in New York City at the option of the bondholders and had nothing whatever to say concerning the deposit of said moneys at any time or place and neither said Board nor the City Council legally could have in any respect governed McGlone's exclusive control of said funds, had either of them been so disposed.

Moulten v. *McLean*, 5 Colo. App. 454;
Todd v. *Elkins*, 101 Colo. 269, 277;
In re House Resolutions, 12 Colo. 395;
Meads v. *U. S.*, 81 Fed. 684;
Smith v. *U. S.*, 170 U. S. 372, 383.

FIFTH: Said opinion says:

> "Finally the Treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners, to make the remittances to Kountze Bros. in such manner as to comply with the City's contract with that Banking House,"

when as hereinafter shown said Board is a mere administrative agency without a semblance of legislative authority to enter into such a contract for the City and its Treasurer, and whose only authority derives from said Section 264 D (297 B of the 1927 Edition) of the Municipal Charter; that thereunder it is required to act only when sitting as a Board; that the record herein shows that there was not even an attempt on the part of the defendants to show that said Board ever even knew of, much less ordered, its Assistant Manager to write said letters and that even contracts authorized by it in connection with the management and control of said water works system and plant are expressly required by said section of the Charter to be countersigned and registered by the auditor, and that "all action by the Board shall be taken by a majority of the Board, and not

otherwise," and Section 7 of said Charter expressly provides that all bonds, contracts and other instruments of writing requiring the assent of said City shall be executed by its Mayor and attested by its Clerk, with its seal attached.

Especial attention is here called to the fact that said opinion, from which the foregoing and the following quotations are made, not only bases and makes the decision and judgment in this case turn upon the existence of such a contract, entered into by said Water Board to bind the City and McGlone to deposit said moneys in the Kountze Brothers Bank in violation of the express provisions of the Charter but as hereinafter shown, said opinion does, as it necessarily had to do before such a conclusion could be reached or stated, expressly base McGlone's release upon the distinct ground that, as Treasurer or custodian of said water works funds, he was subject to an order that was enacted and whereunder he, as such Treasurer, was "expressly directed by his superior officers, the Denver Board of Water Commissioners, to make the remittances to Kountze Bros.," instead of paying said coupons AT Kountze Brothers Banking House in New York City as said ordinance and the bonds themselves provide.

SIXTH: Said opinion finally states its conclusion as follows:

> "Applying the rule of strict accountability to the defendant treasurer which we have followed in previous cases in this jurisdiction, we are of the opinion that this case comes under the exception to that rule set forth in the McBride case and recognized in the three Federal cases therein cited. Here we are of the opinion that the obligation in the bond to 'faithfully and promptly perform the duties of said office' includes the duty of making the remittances to Kountze Bros. in New York on the time schedule ordered by the Denver Board of Water Commissioners."

We respectfully submit that as regards the foregoing concluding paragraph of said opinion, it is especially noticeable that in its arrival at such an astounding conclusion said opinion, apparently overlooks all consideration of the requirement contained in the ordinances that authorize said bond issues and in said bonds themselves, that they and their coupons should, at the option of the bondholders, be payable AT Kountze Brothers Banking House in New York City; and that the conclusion so stated in said opinion was arrived at, given and made without notice to and in the absence of said bondholders who were indispensable parties to any action wherein their contract rights might be so disposed of, and without whose presence said Court was, according to its own commitments, without semblance of jurisdiction to pronounce any such judgment.

Denver Land Co. v. *Moffat Tunnel Improvement District*, 87 Colo. 1; 284 Pac. 339.

It is further especially noticeable that in its statement of said conclusion said opinion makes no mention of the fact that in *People ex rel.* v. *Koenig*, 99 Colo. 456, p. 459 (a case in which the bonds and interest coupons were made payable AT Kountze Brothers, just as were the bonds herein involved) it is expressly held that:

> "In whatever view considered, therefore, as we think, when the county treasurer deposited county funds with Kountze Brothers he acted gratuitously, and since loss attended his unauthorized action, the situation is controlled by the Patterson decision and the Colorado cases there cited."

And all of the cases there cited apply "the rule of strict accountability" which said concluding paragraph says was being applied in the decision of this case. Still, in all of said cases, the treasurers were held liable upon the same

state of facts as this record shows, while the defendants herein were held to be free from all liability.

It is still more especially noticeable that, in stating such an astounding conclusion, said opinion should, in such an obvious evasion of the issues and facts actually shown on the face of this record, so arbitrarily and capriciously ignore and cast into discard the actual facts shown on the face of the record and, in addition, the clean-cut and uncompromising distinction that carries with it such a very great difference between the actual facts shown on the face of said *McBride* case (111 Colo., 577) and the actual facts shown on the face of this record and in all the cases to which *People ex rel.* v. *Koenig, supra,* refers.

That distinction is this: That McBride was the treasurer of Trinidad, a second class city of Colorado, that is subject to the plenary powers of the State Legislature from which its charter derived. (*Denver* v. *Hallett,* 34 Colo. 393, 399; *Dalby* v. *City of Longmont,* 81 Colo. 271.) Its council was authorized by that Legislature (1935 Colo. Stat. Ann. Chap. 163) to do so and it did by ordinance actually assume control of the moneys involved in that case, by providing by ordinance as follows:

> "It shall be the duty of the city treasurer, and he is hereby, ordered to remit to the Banking House of Kountze Brothers aforesaid, by check or draft payable in New York City, New York, on the fifteenth days of June and December so long as said bonds shall remain outstanding and unpaid, a sum of money sufficient to discharge the interest accruing upon said bonds upon the first days of July and January of each year and on the fifteenth day of December in the year 1937 said treasurer shall remit a sum sufficient to discharge the principal of any of said bonds then outstanding and unpaid."

On the other hand, the City and County of Denver is a "Home Rule" city, the authority of whose people, in the

enactment of its Charter provisions for the government and control of all such local and municipal matters, is equally exclusive and exactly as plenary as that of the Legislature of the state in its enactment of statutes and making of charters for the second class cities of Colorado.

Denver v. *Telegraph Co.*, 67 Colo. 225, 235;
Denver v. *Henry*, 95 Colo. 582, 586.

Such being the record with which the Supreme Court of Colorado was confronted when said opinion was given and made, and we still being staggered by the length to which said opinion has gone in its statements respecting the issues of law and fact in said case, in deep humility and with profound regret we ask excuse for the length of all the foregoing by giving assurance that the burden to find a less detailed method of approach for the exposition of the errors embodied in said opinion has been for us a matter of agonizing difficulty. Our purpose has been, and is, to meet our responsibilities by demonstrating as nearly and clearly as possible, from the actual facts shown by this record, of what shoddy material said opinion is composed; and, as we are forced to contemplate its grim potentialities, we find ourselves alternately placing "our mouth in our hands and our hands in the dust, crying 'Unseen—unseen' " and arising to assert ourselves in muffled undertones, "O Justice, when expelled from thy local habitation, move onward and upward to find a higher dwelling place,"—the Supreme Court of the United States.

And as we start in that direction, we desire in fairness to Mr. Justice Hilliard (the author of the opinions in *People ex rel.* v. *Koenig*, 99 Colo. 456, and in *Patterson* v. *People*, 98 Colo. 86) to respectfully call attention to the fact that he "was absent at the time of oral argument and did not participate" in the decision of this case.

F

Grounds upon Which It Is Contended the Questions Involved Are Substantial

I

THE DECISION OF THE SUPREME COURT OF COLORADO IN THIS CASE IS IN FAVOR OF THE VALIDITY OF AN ORDER OF THE BOARD OF WATER COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, WHICH IS DRAWN IN QUESTION ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Colorado has held in this case that those certain letters that are quoted in the opinion herein, constitute an order of the Board of Water Commissioners of the City and County of Denver, State of Colorado, which, when read in connection with that certain other letter that appears as Exhibit E at page 94 of the record, constitute a contract whereby said City and McGlone were bound to deposit the moneys in question in Kountze Brothers Bank, even to the extent that had said McGlone failed to so deposit said moneys he would have breached his general official bond upon which this action is bottomed.

Notwithstanding said Board of Water Commissioners is a mere administrative board, agency or department of said City and County, that is employed exclusively in the control and management of the City's water works, system and plant (In re Senate Bill 12, Colo. 188, 190-191; *County of Larimer* v. *Ft. Collins*, 68 Colo. 364; 43 C. J. 858, Sec. 1529; 2 McQuillen Municipal Corp. (2nd Ed.) Sec. 452, p. 99); and its sole authority as such derives from Section 264 D (297 B of the 1927 Edition) of the Municipal Charter; nevertheless the Supreme Court of Colorado in construing and applying

said Letters has decided that they constitute a valid, binding order that necessarily had to enter into the pretended contract whereby said City and McGlone are held by said Court to have been bound and with reference to which alone said contract had to be executed if it were to become such a binding contract as stated by said Court, in any sense of that word.

Meads v. *U. S.*, 81 Fed. 684, 687;
Bragg City Special Road Dist. v. *Missouri*, 66 A. L. R. 1056, 1059 and note;
Nicholas County Court v. *Morrison*, 115 W. Va. 18, 174 S. E. 562;
Choate v. *Trapp*, 224 U. S. 665, 671.

Such being the construction and application placed on and made of said pretended order by said opinion, necessarily it had to hold, and has held, that said order was enacted by said Board acting in a legislative capacity, because it necessarily would have to act in such a capacity for the exercise of the discretion essential to a determination of the question whether such a contract should be entered into for the purpose of so binding the City and McGlone (if it had any semblance of authority to enact such a law) as said Court has held it did.

> "To hold that power to prescribe the duties of the treasurer includes the power in the Board to select a depository, would be to hold that under authority to prescribe the duties of the treasurer the Board was vested with an authority legislative in character—an authority to determine not only that a depository should be selected and the funds deposited therewith, but also authority to prescribe the manner and conditions under which it should be selected. The contention assumes and its allowance must assume, that primarily and as a basis for making it the duty of the treasurer to deposit the funds in the designated depository, the

> Board could lawfully contract with the person or corporation to become the depository of the funds, that is make a contract whereby the depository became the debtor of the District under a contract for such time and upon such terms as the Board, in the exercise of an unbridled discretion might see fit to grant. Under that theory the Board could let the money of the District without notice, without competitive bids, without requirement of payment of interest or by the giving of security, for a time only limited by the whim of the members."
>
> *Bragg City Special Road Dist.* v. *Missouri*, 20 S. W. 2 D 22, 66 A. L. R. 153, 159.

Regardless of the fact that it has always been the law of Colorado that the absolute and unqualified control of such moneys is vested in such treasurers and that no other official or department of government can legally interfere therewith except in the case of second class cities, in which such control is authorized by the Legislature to be assumed by the councils of such second class cities (*Moulton* v. *McLean*, 5 Colo. App. 454; In re House Resolutions, 12 Colo. 395; *Todd* v. *Elkins*, 101 Colo. 269, 277; *McBride* v. *People*, 111 Colo. 577, 63 Pac. 2 D 777); and notwithstanding the City and County of Denver is a Home Rule city whose people are, under Article XX of the Constitution of the State of Colorado, vested with exactly the same absolute authority in enacting charter provisions for the control of such moneys that the Legislature of the State has in the enactment of statutes for the government of other than home rule cities, as shown hereinbefore; and by Section 4 (98 of the 1927 Edition); Sec. 51 (99 of the 1927 Edition); Sec. 53 (101 of the 1927 Edition); Sec. 54 (102 of the 1927 Edition); Sec. 58 (106 of the 1927 Edition); Sec. 221 (Sec. 108 of the 1927 Edition); Sec. 234 (111 of the 1927 Edition); Sec. 236 (113 of the 1927 Edition), and Sec. 264 D (297 B of the 1927 Edition of the Denver Charter) the

exclusive control and absolute and unqualified responsibility for the safekeeping, disbursement and accountability for all moneys of said city and county, from whatsoever source derived, are cast upon said Manager of Revenue, ex-officio Treasurer (all of which sections of said Charter that are material here are set forth in the appendix hereto under Exhibit C), still the Supreme Court of said State has decided in favor of the validity of said pretended order, law or statute of said Board of Water Commissioners, which, as so construed and applied, was and is drawn in question by the city on the ground of its being repugnant to the Constitution of the United States.

Consequently, as so construed and applied in this particular instance, said order has been held by said Court to be an order, law or statute of the City and County of Denver, State of Colorado, and for the purpose of appeal said order is a "Statute of any State" within the meaning of Section 237 (a) Judicial Code, 28 U. S. C. A. Sec. 344 (a); because:

> "The meaning of 'statute of any state' is not limited to acts of the Legislature. It is used to include every act legislative in character to which the state gives sanction, no distinction being made between the acts of the State Legislature and other exertions of the state law making power."
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> *Hamilton* v. *Regents Univ. Calif.*, 293 U. S. 245, 55 S. Ct. 197, 202;
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> *Standard Computing Scale Co.* v. *Farrell*, 249 U. S. 571, 577;
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> *Ramond* v. *Chicago Traction Co.*, 207 U. S. 20, 35, 36;
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> *John P. King Mfg. Co.* v. *City of Augusta*, 277 U. S. 100, 48 S. Ct. 489;
>
> *Miller* v. *Schoene*, 276 U. S. 272, 48 S. Ct. 246;
>
> *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 64 S. Ct. 384.

II

SAID ORDER OF THE BOARD OF WATER COMMISSIONERS AS SO CONSTRUED AND APPLIED BY THE SUPREME COURT OF COLORADO DEPRIVES THE CITY OF ITS VESTED CONTRACT PROPERTY RIGHTS IN VIOLATION OF AMENDMENT XIV OF THE UNITED STATES CONSTITUTION.

The complaint in this case is bottomed upon the general official bond contract of McGlone as Manager of Revenue, ex-officio Treasurer of the city. Said contract was executed with reference to Section 105 of the city's charter (Ex. C), of which it is an integral part, and, concurrently with the execution thereof, the rights of the city thereunder became vested property rights.

Choate v. *Trapp*, 224 U. S. 665, 671.

> "Valid contract rights are 'property' rights whether the obligor be a private individual, municipality, state or the United States."
>
> *Lynch* v. *U. S.*, 2912 U. S. 571, 577, 55 S. Ct. 840-844.

> "a right of action which springs from a contract is property within the protection of the Fourteenth Amendment."
>
> *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325;
>
> *Lamb* v. *Power River Co.*, 132 Fed. 434, 439.

> "Where a right has arisen upon a contract or transaction in the nature of a contract authorized by statute and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right, which stands independent of the statute."
>
> *Steamship Co.* v. *Joliffe*, 69 U. S., 2 Wall., 450;
>
> *Coombes* v. *Getz*, 285 U. S. 434, 53 S. Ct. 435.

The validity of said general bond contract is in no respect questioned by either McGlone, the Company or by said opinion of the Supreme Court of Colorado, neither is the validity of the ADDITIONAL bond that was executed to the city by McGlone and the Fidelity & Deposit Company of Maryland in any respect questioned by either of said parties or by said opinion.

McGlone and the Company simply asserted that the bond was a SPECIAL bond while said opinion held that it was a supplemental bond. Upon the issue of their non-liability upon said general official bond, the only questions presented by McGlone and the Company for decision were that said bond did not cover the water works funds but that said SPECIAL bond did; that in his receipt and disbursement of said funds McGlone was the treasurer of said Water Board or the custodian of said water works funds and that he was relieved of liability upon said special bond by the orders and directions of said Water Board. Neither he nor said Company ever made so much as a suggestion that there ever existed any such thing as a contract between the city and Kountze Brothers Banking House, whereby the city and McGlone were bound by any kind of contract entered into in their behalf by said Board for the deposit of the moneys that were lost in Kountze Brothers Bank. Not until said opinion was rendered was any such thing ever hinted at by anyone, from the beginning until the final submission of said case for decision.

Notwithstanding the issue so presented for decision, said opinion based the release of McGlone and the Company from liability upon said general official bond squarely upon the proposition that both the City and McGlone were bound by such a contract so entered into with Kountze Brothers on their behalf by said board. So that, as this case stands at the present time, the city asserts the existence and terms

of its general bond contract and of property rights that became vested in it thereunder concurrently with its execution; while on the other hand said opinion of the Supreme Court of Colorado asserts the existence (without committing itself to any rational terms) of a conflicting contract which, if valid, as said opinion decides, would utterly defeat the vested rights of the city under the contract it asserts.

Both of said asserted contracts involve and consist of "statutes of any state," with reference to which they necessarily had to be made, if made at all, and which necessarily had to enter into and become parts of said asserted contracts before either of them could have any valid existence.

The decision of the Supreme Court is in favor of the validity of the pretended statute and contract that are asserted in said opinion and the validity thereof was drawn in question by the city on the ground of its repugnancy to the Constitution of the United States.

Necessarily the pretended statute and contract asserted in said opinion were enacted and entered into, if at all, subsequent to the statute and contract asserted by the city, because the official bond contract upon which this action is bottomed was based upon Section 105 of the city's Charter, which was enacted by the people of said city in 1904, and which required as a condition precedent to the qualification and induction of said McGlone into said office that he should execute such an official bond to the city, just as he did.

Likewise said additional bond was required to be executed by said McGlone to said city prior to his induction into office. Therefore, for the reason that said Board of Water Commissioners could not by any possibility enact or give any orders of any kind to said McGlone as Manager of Revenue, ex-officio Treasurer of said city, or as Treasurer of said Water Board, or custodian of said water works fund (had any such office ever had any semblance of existence)

until he had theretofore become qualified and entered upon the duties of his office; necessarily the order or statute to which said opinion refers would have to be subsequent to the execution either of said general bond or of said so-called special bond; and to have the effect attributed to it by said opinion said pretended order would have to repeal *pro tanto* not only Sections 105 and 106, but all of the other sections of the city's Charter, including the portions of said Section 264 D (297 B of the 1927 Edition) thereof that cast the whole responsibility for the receipt, control and disbursement of the city's moneys, including said water works funds and all other moneys from any source whatsoever, upon said Manager of Revenue, ex-officio Treasurer.

Consequently, if said general official bond and the additional bond that were required to be executed by said McGlone before he could qualify or be inducted into office were valid when executed to the city, in accordance with said Charter requirements, as they show on their faces they were (record, pages 92, Ex. C), with their execution property rights thereunder immediately became vested in the city, of which it could not be deprived by any possible order of said Board without violation of Amendment XIV of the United States Constitution, because such property right having so "become a vested right, which stands independent of the Statute", there would be no way or manner by which said Board could enact a subsequent order or statute that would not of necessity not only have to repeal such antecedent charter provisions or statutes, but would likewise, from necessity, deprive the city of such antecedent vested property rights.

Necessarily, before any such order enacted by said Board could have any effect whatever, that Board would have to be vested with authority at any time to assume control of such moneys and even the opinion handed down in this

case is not bold enough to assert that said Board has any such authority—evidently for the reason that it could not make mention of any of said sections of the city's Charter without divulging on its face that said Board has not the least semblance of such authority as said opinion has said it exercised, without one word in the record that gives the least support to the decision so promulgated.

WHEREFORE, whether any such contract or valid obligation as the opinion herein says exists, does exist, to defeat the vested rights that are asserted by the city, is respectfully submitted to be a question for decision by this Court on appeal, under Section 237 A, Judicial Code, 28 U. S. C., Sec. 344 (a), because of the thoroughly established construction of that section by this Court, as follows:

> "A decision of a State Court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied and the judgment is therefore reversible by writ of error under Section 237 of the Judicial Code.
>
> "The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."

Fiske v. *Kansas*, 274 U. S. 380, 47 S. Ct. 655.

> "To give the Supreme Court jurisdiction under 237 (a) no general form of words are necessary, but the claim is regarded as having been adequately presented if the record shows expressly or by fair intendment that it was brought to the attention of the State Court with fair precision and in due time. It is not necessary that the ruling of the State Court sustain a state statute against a claim of invalidity under the Federal Constitution and laws should have been put in direct

terms, but it is sufficient if the necessary effect of the judgment was to deny the claim of invalidity."

People ex rel. v. *Zimmerman,* 278 U. S. 63, 49 S. C. 61.

"Where it becomes necessary to consider whether a state is depriving or attempting to deprive a litigant of property without due process of law, in violation of the Fourteenth Amendment, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms."

Railway Comm. v. *Eastern Tex. Ry. Co.,* 264 U. S. 79, 44 S. Ct. 247;

Municipal Investors' Assoc. v. *City of Birmingham,* 316 U. S. 153; 62 S. Ct. 975;

Forbes Pioneer Boat Line v. *County Commissioners,* 258 U. S. 338, 42 S. Ct. 325;

Coombes v. *Getz,* 285 U. S. 434, 53 S. Ct. 435;

Tidal Oil Co. v. *Flanagan,* 263 U. S. 444, 44 S. Ct. 197, 199;

Coppage v. *Kansas,* 236 U. S. 1, p. 15;

John P. King Mfg. Co. v. *City Council of Augusta,* 277 U. S. 100, 48 S. Ct. 489;

Demorest v. *City Bank, etc. Co.,* 321 U. S. 36; 64 S. Ct. 384.

(Assignments Fourth, Fifth, Sixth and Seventh are so closely related in principle, as respects the question of jurisdiction, that for brevity they are combined for discussion under the following heading.)

III

THE SUPREME COURT OF COLORADO BASED THE DECISION AND JUDGMENT IN THIS CASE UPON AN ISSUE THAT WAS NOT PRESENTED FOR DECISION AND UPON A STATEMENT OF FACTS THE DIAMETRICAL OPPOSITE OF WHAT THE RECORD SHOWS, AND IN SO DOING CONFISCATED AND DEPRIVED THE CITY OF ITS VESTED PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW, BY REVERSING THE JUDGMENT OF THE TRIAL COURT UPON A RECORD THAT PLAINLY SHOWS A TOTAL FAILURE OF PROOF.

We respectfully submit that while it is easy to understand how it was possible for McGlone to follow the alleged "custom" of his predecessors in office of depositing such moneys in Kountze Brothers Bank without taking advice with respect to the legality of that procedure, and that it is likewise apparent how easy it was for defendants to seize upon that "custom" in the hope that it might constitute a defense to the action that they were called upon to answer; but, not only does such a "custom", including knowledge of its existence by a Board of Commissioners, fail to constitute such a defense (*People ex rel.* v. *Koenig*, 99 Colo. 456), but when the absolute control and responsibility for the safekeeping, disbursement and delivery of such moneys to his successor in office are cast upon such a custodian of public moneys by the Charter or Constitution of a City, as in this case, those provisions cannot be enlarged or restricted by any legislative action asserted by any official or department of the city, whether legislative, executive or administrative.

Smith v. *U. S.*, 170 U. S. 372, 383;

Meads v. *U. S.*, 81 Fed. 864;

Fidelity & Deposit Co. of Md. v. *U. S.*, 55 Fed. 2d 101, 103;

Phillips v. *U. S. Grain Corp.*, 279 Fed. 244, 248;

In re House Resolutions, 12 Colo. 395.

Neither is it hard to figure out just how, in view of the Common Law doctrine as respects the release of sureties, resort was had to the compromise and settlement of the action against McGlone and Fidelity & Deposit Company of Maryland for the attempted defenses that were set forth in the supplemental answers herein and how, when Sections 4, 5 and 6, Chapter 92, C. S. A. 1935 were called to attention, those defenses were dropped and endeavor made to secure from the city a trial of the case upon an "Agreed Stipulation of Facts" beneath the cover of which that hot issue might be hid from view and, as a last desperate effort, resort might be had to the argument that McGlone was excused by the orders, directions and arrangements which in his original answer he alleged, on information and belief, said Board had made for the various accounts on the books of Kountze Brothers to be "opened and maintained by Kountze Brothers at the direction of said Board of Water Commissioners" (record, pages 31, folios 68-70).

But, in the name of justice and common decency, we submit that, it is an utter impossibility to find in this record one scintilla of evidence to support, or one shred of excuse for basing, the decision of this case upon an issue that was never in any manner presented for decision, or for such statements therein as that "The facts, agreed upon by stipulation between the parties, include the following:" followed by such a misrepresentation of the actual facts that are shown on the face of the record as said opinion makes with such lack of hesitation.

And we respectfully submit that in basing and making said decision and judgment to turn upon both an issue of law that was not presented for decision, and upon a statement of facts that is the opposite of the actual facts shown on the face of the record, not only was the judgment of the Trial Court reversed upon a record that plainly shows a total failure of proof, but thereby this petitioner-appel-

lant would be, without notice or opportunity to be heard, deprived of its vested property rights in said official bond contract and also of all remedy for its enforcement, in violation of said Fourteenth Amendment—absent a Supreme Court of the United States.

Said opinion not only says that the city was bound by a contract entered into in its behalf by said Board, notwithstanding Section 29 (Section 7 of the 1927 Edition) of the City's Charter expressly provides that:

> "All bonds, contracts or other instruments of writing requiring the assent of the City and County shall be subscribed by the Mayor or Acting Mayor, as the case may be, under the seal of the City and County and attested by the Clerk",

but goes to the full extent of saying that McGlone was bound by said contract or order of said Board of Water Commissioners acting as his "superior officers", notwithstanding said Section 264 D (297 B of the 1927 Edition) of the City's Charter provides even in cases where said Board contracts when acting within the scope of its administrative duties:

> "The auditor of the City and County of Denver shall • • • countersign and register all contracts",

and that:

> "All action by the Board shall be taken by a majority of the Board and not otherwise",

and the Supreme Court of Colorado has:

> "Consistently held that contracts executed by municipal corporations in which there was a failure to comply with the mandatory provisions of the applicable statutes or Charter are void."
>
> *Swedlund* v. *Denver Bank,* 108 Colo. 400, 408.

And this record plainly shows that apart from the official bond contract that is the subject of this action, there is not

one scintilla of evidence anywhere to be found of a contract of any kind or of anything that shows even an attempt on the part of said defendants to allege or prove anything of the kind; nor do the letters upon which the whole decision of said Court is based and made to turn embrace one single intimation, much less element, of a contract or "mutual agreement between two or more competent parties for a valuable consideration touching a lawful subject matter."

So it would seem to be perfectly apparent that both of the contracts that are asserted by the city on the one hand, and in the opinion of the Supreme Court herein on the other hand, cannot possibly stand the light of day. Which one it is to be or not to be—that is the question that we herewith present for this Court's consideration and final decision under Section 237 (a) of the Judicial Code, and in so doing we respectfully submit that we are not thereby required to come seeking any mere privilege to praise a Caesar —the contract that never was—but to claim a definite right under said section to bury him—not only because he so clearly deserves it, but because, as we sincerely believe and contend, this is still, and will continue to be, America—so long as this Court still lives and the following fundamental principles remain a part of "the law of the land:"

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment, to be conclusive upon the parties to the litigation must be responsive to the matters controverted."
>
> *Reynolds* v. *Stockton*, 140 U. S., 254.
>
> "It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavail-

ing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

Washington Railroad v. *Bradleys*, 10 Wall, 299, 303;

Newman v. *Bullock*, 23 Colo. 217;

Russell v. *Shurtliff*, 28 Colo. 414.

"When a person is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor v. *McVeigh*, 93 U. S. 274.

"Purely arbitrary or capricious exercise of power whereby a wrongful and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all remedy is at variance with fundamental principles.

"Conversely stated, the 14th Amendment requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the foundation of all our civil and political institutions and which are frequently designated as 'law of the land.' "

American Jurisprudence, p. 278, Sec. 581;

Truax v. *Corrigan*, 257 U. S. 312; 42 S. Ct. 673; and

"The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673; 50 S. Ct. 451.

For these reasons, we respectfully submit that the city has been deprived of both its substantive vested right in said bond contract and of its remedial right to be heard

in defense thereof by said pretended order of its Board of Water Commissioners, as the same has been construed and applied in said opinion, and that such deprivation or confiscation of such vested rights is the combined result both of said order and said decision which, when considered either jointly or separately, bring the case within the shelter of the principles hereinbefore set forth and to which this Court has so often called attention in such cases as those cited in *Tidal Oil Company* v. *Flanagan, Coombes* v. *Getz* and *Brinkerhoff-Faris* v. *Hill, supra.*

IV

THE DECISION OF THE SUPREME COURT OF COLORADO APPLYING AND ENFORCING SAID ORDER OF SAID WATER BOARD WAS WITH DISTINCTNESS AND TIMELY INSISTENCE DRAWN IN QUESTION BY THE CITY ON THE GROUND THAT SAID ORDER, AS SO CONSTRUED AND APPLIED IS REPUGNANT TO AMENDMENT XIV OF THE UNITED STATES CONSTITUTION.

As a matter of course, it was impossible for the City to anticipate that the decision of this case would be based upon an issue that was never in any manner presented for decision or upon a statement of facts the opposite of what the record shows. The petition for rehearing shows that, at its first opportunity, the City insisted upon being heard upon the constitutional questions so necessary to be considered and decided before any final judgment could rightfully be entered in said cause. The right to be heard in its defense upon said questions was denied, with the consequence that the denial of its timely and distinct insistence upon its right to be heard upon such questions brings this case squarely within Section 237 (a) of the Judicial Code for the purpose of this appeal.

Herndon v. *State of Georgia*, 295 U. S. 441, 55 S. Ct. 794;

Municipal Investors' Assn. v. *City of Birmingham*, 316 U. S. 153; 62 S. Ct. 975.

G

Statement of Proceedings at Which, and Manner in Which, in the First Instance, and in the Appellate Court, the Federal Questions Sought to Be Reviewed Were Raised.

Said Federal questions were raised by the City at its first opportunity by petition for rehearing in the appellate court, and a summary thereof is in substance that said Court had in its opinion overlooked and misapprehended matters of law and fact essential to a proper determination of said cause and in particular the points that by its construction of the ordinances and order of said Water Board to which it refers Sections 105, 106 and the provision of Section 297B of the 1927 Edition of the City's charter, which mandatorily requires that the treasurer shall pay such bonds and interest without warrant or audit, would be repealed; that thereby said Court had drafted a contract for the city which, if drafted by its attorney would be void and in violation of its charter, and that if said opinion were not withdrawn and the judgment of the trial court affirmed the City would be deprived of its property without due process of law, in violation of Section 1 of Article XIV of the United States Constitution, for the reasons hereinbefore set forth. Said petition asked that a rehearing should be ordered and that in order to implement that order, the City should be permitted to file a supplemental brief; but said petition was denied (R. pp. 108-115).

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on

appeal of the Supreme Court of the United States for the reasons and upon the grounds that:

UNDER: SECTION 1, AMENDMENT XIV OF THE CONSTITUTION

First: Upon the ground that herein there is drawn in question, on the ground of its repugnancy to the United States Constitution, a statute of the State of Colorado in favor of the validity of which the Supreme Court of said State has decided, and for the review and construction of which this Court has jurisdiction on appeal under Section 237 (a) of the Judicial Code.

Hamilton v. *Regents Uni. of Calif.*, 293 U. S. 245; 55 S. Ct. 197, 202;

Standard Computing Scale Co. v. *Farrel*, 249 U. S. 571, 577;

Demorest v. *City Farmers Bk. Trust Co.*, 321 U. S. 36; 64 S. Ct. 384;

Miller v. *Schoene*, 276 U. S. 272; 48 S. Ct. 246;

John P. King Mfg. Co. v. *City of Augusta*, 277 U. S. 100; 48 S. Ct. 489;

C. B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

Second: Upon the ground that this Court has jurisdiction on appeal under Section 237 (a) of the Judicial Code, for the reason that the State of Colorado has deprived and is attempting to deprive appellant of its contract and vested contract property rights in violation of the due process clause of Amendment XIV of the United States Constitution.

Railway Comm. v. *East Tex. Ry. Co.*, 264 U. S. 79; 44 S. Ct. 247;

Coombes v. *Getz*, 285 U. S. 434; 53 S. Ct. 435;

Forbes Pioneer Boat Line v. *County Comm.*, 258 U. S. 338; 42 S. Ct. 325;

Coppage v. *Kansas*, 236 U. S. 1, p. 15;

Municipal Investors' Assn. v. *City of Birmingham,* 316 U. S. 153; 62 S. Ct. 975;

Tidal Oil Co. v. *Flanagan,* 263 U. S. 444; 44 S. Ct. 197, 199;

Demorest v. *City Bank, etc. Co.,* 321 U. S. 36; 64 S. Ct. 384.

Third: Upon the grounds that the State of Colorado, through its judicial department, has deprived and is attempting to deprive appellant of its property without due process of law in violation of Section, Amendment XIV of the United States Constitution, (1) by making the decision and judgment in this case to turn upon (a) an issue that was not in any manner presented for decision, and (b) upon a statement of facts that do not appear in, and that are opposite to the actual facts shown on the face of, the record herein; (2) by denying appellant an opportunity to be heard in defense of its contract and vested contract property rights upon which this action is bottomed, and (3) by reversing the judgment of the trial court herein upon a record that plainly shows a total failure of proof.

Reynolds v. *Stockton,* 140 U. S. 254;

Windsor v. *McVeigh,* 93 U. S. 274;

Truax v. *Corrigan,* 257 U. S. 312; 42 S. Ct. 673;

Brinkerhoff-Faris Co. v. *Hill,* 281 U. S. 673; 50 S. Ct. 451;

Myles Sale Co. v. *Iberia Drain Dist.,* 239 U. S. 478, 480 484;

C. B. & Q. Ry. Co. v. *Chicago,* 166 U. S. 226.

Fourth: Upon the ground that the appellant, in apt time, distinctly and with insistence drew in question the validity of a statute of the State of Colorado as the same was construed and applied by the Supreme Court of said state in this case.

Herndon v. *State of Georgia,* 295 U. S. 441; 55 S. Ct. 794 and case cited therein;

Municipal Investors' Assn. v. *City of Birmingham,* 316 U. S. 153; 62 U. S. 875;
Brinkerhoff-Faris Co. v. *Hill,* 281 U. S. 673; 50 S. Ct. 451.

Conclusion

We desire to state as our conclusion that not in the least respect do we believe or pretend to suggest that the Associate Justices who concurred in said opinion ever read over the record in this case. On the contrary, we have every confidence to believe that they simply placed their confidence in some such statements as those that are shown on the face of said opinion, and in that manner the actual issues and facts that appear in said record escaped their notice.

But we do respectfully submit that the final judgment entered in this case is not the judgment of a court, even if for the trial court the decision to which assent was so given is now the "law of the case," and the appellees may smilingly say: "It is *res adjudicata*"; because that decision was given and made in the face of a record that fails to show even a shadow of jurisdiction to decide the false issues which the opinion herein so erroneously states; while, for the time being, the City asks here for its opportunity to be heard, as interest continues to accumulate at the rate of six per cent, and it wonders why such a statement could have been made as that contained in the last paragraph of said opinion which says in substance that the "rule of strict accountability" was being applied as the case was then and there being decided and made to turn upon the exception to that rule that was applied in the *McBride* case, which so clearly shows on its face the very opposite of what the record herein shows in such unmistakable terms.

Respectfully submitted,

MALCOLM LINDSEY,
THOMAS H. GIBSON,
Counsel for Appellant.

EXHIBIT "A"

No. 15343—Oct. 1, 1945

WILLIAM F. MCGLONE AND CONTINENTAL CASUALTY COMPANY, a Corporation, *Plaintiffs in Error,*

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, *Defendant in Error.*

Error to the District Court of the City and County of Denver, Hon. Henry A. Hicks, Judge

EN BANC.

Judgment Reversed

MR. WILLIAM F. MCGLONE, PRO SE,
BANCROFT, BLOOD AND LAWS,
Attorneys for Plaintiffs in Error.

MR. MALCOLM LINDSEY,
MR. THOMAS H. GIBSON,
Attorneys for Defendant in Error.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The City and County of Denver obtained a judgment against its manager of revenue, who by virtue of that office was exofficio treasurer of the City and County of Denver, and his bondsman, the Continental Casualty Company, in the amount of $14,483.33. This judgment was based upon a bond, executed by the manager of revenue as principal and the bonding company as surety, given to secure the faithful performance of the official duties of the manager of revenue. Principal and surety bring the case here by writ of error. We shall refer to the parties as they appeared in the trial court. There is no conflict of evidence in the case. The facts, agreed upon by stipulation between the parties, include the following:

The Denver city council adopted three ordinances: one in 1914 providing for the issuance of $8,000,000 municipal water bonds; one in 1923 authorizing an additional $6,500,-

000; and one in 1928 authorizing the issuance of municipal refunding water bonds, series of 1927. All three ordinances contained the provision that the principal and interest of the bonds should be payable at the option of the holder at the banking house of Kountze Brothers in New York City or at the office of the treasurer of the City and County of Denver. Previous to the adoption of each ordinance, issuance of the pertinent bond issue had been duly authorized by the majority vote of the qualified taxpaying electors of the City and County of Denver.

It is further stipulated that, "The Board of Water Commissioners, prior to the transmittal of the moneys involved in this suit, authorized and directed the Department of Revenue, Ex-officio Treasurer, and also directed the manager of revenue, to transmit said moneys to the said Kountze Bros. Banking House at New York, to take care of the payment of all the bond interest coupons that might be there presented, and the said moneys were transmitted by the defendant McGlone and his predecessors, in obedience to the orders and directions of the Board of Water Commissioners, and all of the transmittals were made according to the orders and directions, and according to the Charter and Ordinance provisions of the City and County of Denver."

Defendant McGlone took office on June 1, 1931. Prior to that time his predecessor in office, Collins, had transmitted "to the Banking House of Kountze Bros. in the City of New York, from time to time, as needed, money from the Water Works Fund, for the purpose of meeting payments on current and next maturing interest coupons on the Municipal Water Bonds Series 1914, Series 1923 and Series 1927, which might be there presented for payment when due. The transmittals were made from separate funds respectively, and separately kept on the official books of the Treasurer, and in separate bank accounts. The separate funds had previously been set aside by the Treasurer for such several purposes out of the proceeds of the revenues received from the operation of the Water Works System and Plant, in accordance with the Charter provisions and Ordinances of the City and County of Denver, and with

the orders of the Board of Water Commissioners. The sums transmitted by Collins, Treasurer, to Kountze Bros. were properly debited by him at the time to the separate coupon accounts of the Water Works Fund, and were by Kountze Bros., properly credited at the time in separate accounts respectively, upon their books, under and according to the direction of said Collins, and of the Board of Water Commissioners."

Defendant McGlone on taking office continued the practice of his predecessors. His immediate predecessor, Collins, had already remitted funds to take care of the June 1, 1931, interest coupons that it was estimated would be presented for payment in New York. Defendant McGlone likewise, within a few days after he assumed office, remitted $20,000 to cover the July 1, 1931, interest coupons, and in July remitted $55,000 to cover the amount of August 1, 1931, interest coupons that it was estimated would be presented for payment at Kountze Bros.

On October 14, 1931, Kountze Bros. became insolvent and were declared bankrupt. At that time there were funds on deposit in the three separate coupon accounts of $25,520. As a result of the failure of Kountze Bros., defendant McGlone, on the expiration of his term of office, June 1935, was unable to turn over to his successor the funds lost in that bank. Whereupon plaintiff brought this action against the two defendants herein, based on their bond for $500,000, and also brought a separate action against defendant McGlone as principal and the Fidelity and Deposit Company of Maryland as surety on a supplemental bond taken out in accordance with a city charter provision for $100,000 covering the official duties of defendant McGlone as treasurer or custodian of the water works fund. The latter proceeding appears to have been dismissed with prejudice by the plaintiff in consideration of the payment to it by the Fidelity and Deposit Company of Maryland of $18,171.26, "and the defendant herein is now made defendant in an action brought by Fidelity & Deposit Company of Maryland against the defendant, Continental Casualty Company, wherein the Fidelity & Deposit Company of Maryland seeks recovery of the same items as are involved in this cause, and predicates its action upon the

claim that it is a subrogee of the plaintiff herein or a sub-surety or co-surety for the defendant McGlone, and the defendant, Continental Casualty Company is presently defendant in two suits by different parties for the same claim or demand."

The amount of the judgment, $14,483.33, was determined by taking the amount on deposit with Kountze Bros. at the time of their failure, $25,977.50, crediting that amount with the $18,171.26 received in settlement with the Fidelity & Deposit Company of Maryland plus the amount received as liquidating dividends from the receiver of the insolvent bank, $3,411.40, and then adding interest at six per cent per annum on the remaining unpaid balances, $10,088.49.

It appears from the record that $477.50 out of the total sum of $25,997.50, which was in the hands of Kountze Bros. at the time of their failure, was money in the interest account of certain building site bonds of the City and County of Denver. The specifications of error relate only to the interest accounts of the three series of water bonds of the City and County of Denver heretofore mentioned, which together made up the total sum on deposit with Kountze Bros. when added to the $477.50 item. The specifications make no mention of this $477.50 building site bond account, nor is it referred to in the stipulation. The record shows no historical background concerning these building site bonds, such as exists relating to the three series of water bonds. There is nothing by which to judge whether the duties of the treasurer relating to the servicing of the interest on the building site bonds were similar to his duties in respect to paying the interest coupons on the water bonds. We are left in no position to pass upon that particular phase of the case, and our opinion and judgment apply solely to the funds in the three coupon accounts with Kountze Bros. relating to the water bonds.

It should also be added that by separate supplemental answers both defendant principal and defendant surety company pleaded the settlement and release executed by the Fidelity & Deposit Company running to the City and County of Denver, and by reason thereof asked that this

cause be dismissed. This phase of the case is not included in the specification of points, and no reference to it appears in the briefs or the oral argument. In accordance with our regular practice, therefore, the points urged in the supplemental answers will be deemed to have been abandoned. *Contes* v. *Metros*, 111 Colo. 561, 144 P. (2d) 782; *Edwards* v. *Quackenbush*, 112 Colo. 337, 149 P. (2d) 809.

The findings of the trial court include this statement: "The defendant McGlone was not guilty of any moral misconduct in connection with the remittance of moneys to New York. The moneys sent by him and his predecessor were sent with the approval and under the orders of the Board of Water Commissioners of the City and County of Denver, and the transaction was shown on the books of the treasurers. McGlone simply followed the course of conduct which had been followed prior to his induction into office. The question involved in this litigation, however, is whether or not under the undisputed facts there is legal liability on the part of the defendants. The court is of the opinion that such legal liability exists, and so finds." This finding was based specifically on two cases, *Patterson, et al.* v. *People*, 98 Colo. 86, 53 P. (2d) 1187, and *People ex rel.* v. *Koenig, et al.*, 99 Colo. 456, 63 P. (2d) 1235, by reason of which the court felt compelled to hold the defendants liable.

The findings and judgment of the trial court were made and entered prior to our decision in *McBride v. People*, 111 Colo. 577, 144 P. (2d) 777. Reference is made to that case and to the Koenig and Patterson cases, supra, in 155 A. L. R. 436 in a recent note on the subject of liability of a public officer on his bond for loss of public funds due to insolvency of bank in which they were deposited. Likewise, all of the original briefs of both parties on appeal were written and filed here while the McBride case was still pending. Immediately after the opinion in that case had been announced, defendants filed a supplemental brief in support of the point that the disposition of the instant case was controlled by the McBride case. In that case we held that where an ordinance of a Colorado city of the second

class expressly makes it the duty of, and orders the city treasurer to remit certain moneys to a bank named in the ordinance for the purpose of paying interest on bonds issued by the city, and moneys so remitted by that official in compliance with the ordinance are lost due to the failure of the bank, neither the treasurer nor the surety on his official bond is liable to the city for such loss.

In the instant case, the respective ordinances passed by the Denver City Council authorizing the issuance of the three bond issues herein involved all provided that the principal and interest of the bonds should be payable at the option of the holder either at Kountze Bros., New York City, or at the office of the City Treasurer in Denver. The ordinances differ from the Trinidad ordinance in the McBride case, in that they contained no express mandate to the city treasurer directing him to remit funds to the bank named in the ordinances and in the bonds and interest coupons issued in pursuance thereof. The record shows, however, that Denver entered into a contract with Kountze Bros. whereby the latter would act as paying agent in New York City for Denver in respect to the three bond issues. The consideration for Kountze Bros. so acting was that Denver would deposit with them the sums necessary to pay the interest coupons, which it was estimated would be presented for payment in New York City at least fifteen days in advance of the due date of the particular interest coupons, payment of which was being provided by the remittance. The record further shows that the following letter from the Denver Board of Water Commissioners, under date of November 24, 1930, was sent to Kountze Bros. in New York City:

> "We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds, Series 1927, due December 1st, have not been forwarded to you, as per your letter of August 3rd, 1927, 15 days prior to the interest paying date.
>
> "We are sorry this instalment was overlooked and will assure you that in the future the funds will be there in proper time."

Under the same date the Board wrote to the then city treasurer, defendant McGlone's immediate predecessor in office, as follows:

> "We are enclosing a copy of a letter from Kountze Brothers dated August 3rd, 1937, (containing the contract arrangements already described) relative to the payment of interest on Denver Municipal Refunding Water Bonds, Series 1927, and also a copy of a letter we are this day writing to them.
>
> "Will you please be governed accordingly."

When defendant McGlone took office, therefore, he was not merely following "the course of conduct which had been followed prior to his induction into office," in the sense that he was following an inchoate habit which he could have changed had he desired not to take the line of least resistance. He, like his predecessor, made the remittances to Kountze Bros. because he found express instructions from the Denver Board of Water Commissioners directing his office to make the remittances in accordance with the terms of an agreement made with the New York banking house. It is not contended that the order of the Board of Water Commissioners directing the City Treasurer to make the remittances was ultra vires. Nor is it argued that the financial arrangement between the Board and Kountze Bros. was either ultra vires or illegal. The creation of the Board of Water Commissioners, as a valid body under the Denver charter, is not questioned. No attack is made on the legality of the elections authorizing the issuance of bonds, nor on the ordinances of the city council authorizing the issuance of the respective bond issues.

The facts in this case, therefore, would seem to make the McBride case, and not the Patterson and Koenig cases, controlling. In the two latter cases we held that the respective county treasurers there involved had acted gratuitously and without any definite legal sanction to support their remittances to the same New York Bank, the insolvency of which has given rise to this litigation.

In this case the city was under valid obligation to the bondholders to pay the bond interest either in Denver,

Colorado, or at Kountze Bros. in New York City, at the option of the bondholder. It was further under valid obligation to Kountze Bros. to make remittances to cover the estimated presentation of interest coupons for payment in New York City at least fifteen days before the due date of the coupons.

The treasurer in turn was not merely authorized, but directed by an ordinance of the City Council, to pay both the principal of the bonds and also the interest coupons, and unlike his other payments—was expressly relieved of the necessity of obtaining warrants therefor.

Finally, the treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners, to make the remittances to Kountze Bros. in such a manner as to comply with the city's contract with that banking house.

The existing circumstances left no field of choice for defendant treasurer—his not to make reply, his not to reason why, his but to obey. The chain of circumstances in this case differs only from that in the McBride case in that here there are a few more links, but the chains are alike in that they tie both treasurers to one specified course of conduct. They leave them no option in the matter. A failure to comply with the directions given them in respect to making provision for the payment of the interest coupons, would, in our judgment, make them liable for a breach of their bonds, even as they have been charged with a breach for failure to turn over the lost funds to their successors in office.

Applying the rule of strict accountability to defendant treasurer which we have followed in previous cases in this jurisdiction, we are of the opinion that this case comes under the exception to that rule set forth in the McBride case and recognized in the three federal cases therein cited. Here, we are of the opinion that the obligation in the bond to "faithfully and promptly perform the duties of said office," included the duty of making the remittances to Kountze Bros. in New York on the time schedule ordered by the Denver Board of Water Commissioners.

The judgment accordingly is reversed.

Mr. Justice Hilliard was absent at the time of oral argument, and does not participate.

On Petition for Rehearing

The Court is of the opinion that any new matters presented in the petition for rehearing are answered either by the opinion or by the stipulation between the parties set forth therein.

Petition for rehearing denied.

Hilliard, J., was absent at the time of oral argument, and does not participate.

EXHIBIT "B"

Filed in District Court, City & County of Denver, Colo. Jan. 5, 1943. John T. Doyle, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

IN THE DISTRICT COURT

No. A 15043

Division 3

CITY AND COUNTY OF DENVER, a Municipal Corporation, *Plaintiff*,

vs.

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY, a Corporation, *Defendants*

Opinion, Findings, and Conclusions of the Court

This action was instituted by the City and County of Denver to recover judgment against William F. McGlone, who was from June 1, 1931 to June 1, 1935 Manager of Revenue, Ex-officio Treasurer of the City and County of Denver, and against Continental Casualty Company, a

corporation, surety on an official bond of said McGlone, for the sum of $25,227.50, which amount the complaint alleges was received by McGlone in said official capacity, and which amount it is alleged he should have, but failed, to turn over to his successor in office. The complaint also demands interest on said sum.

Both defendants answered, denying liability. The case has heretofore been tried to the court without a jury, and taken under advisement, and is now to be decided.

There is no dispute concerning the facts involved in the litigation, although plaintiff objected to the pertinency, relevency and materiality of certain facts introduced in evidence by the defendants. The cause having been tried without a jury, the court has thought best to admit and does admit all of the evidence objected to. This in view of the fact that if a review of the judgment now to be rendered is had in the Supreme Court of Colorado that court will have before it all the facts which have given rise to the litigation.

In the following opinion, findings and conclusions the defendant William F. McGlone is referred to as defendant McGlone, and the defendant Continental Casualty Company is referred to as the Continental Company.

On June 1, 1931 defendant McGlone duly and regularly succeeded one Clem W. Collins as Manager of Revenue, Ex-Officio Treasurer of the City and County of Denver, and defendant McGlone continued in said office until June 1, 1935.

At the time of defendant McGlone's induction into said office he executed an official bond in the sum of $500,000.00, with the Continental company as surety thereon. The pertinent provisions of the bond are in substance that the bond shall be null and void and provided defendant McGlone as such officer should promptly perform the duties of said office, and pay according to law all moneys which come to his hands as such Manager of Revenue and turn over to his successor "all moneys deposited with him for any cause whatsoever and all City and County property which may come to his hands," otherwise the obligations of the bond to remain in full force and effect.

On the same day, June 1, 1931, defendant McGlone, as such official, executed another bond to the City and County of Denver in the sum of $100,000.00. On this bond The Fidelity and Deposit Company of Maryland, not a party to this suit, and hereinafter referred to as the Fidelity Company, is surety. This $100,000.00 bond was given pursuant to Section 264-D of the charter of the City and County of Denver, which provides that the treasurer of said City and County shall operate and keep a separate account of the Water Works Fund of the City and County, in which fund shall be placed the revenue received from the water works system and plant, together with all moneys coming into said fund from other sources, and to enter therein all receipts and disbursements on account thereof, and pay out the funds thereof, and perform other duties as treasurer of said Water Works Fund, and which section also provides that the treasurer shall give such additional bond conditioned in such manner as shall be determined by the Board of Water Commissioners. This $100,000.00 bond contains the same provisions in general as are in the $500,000.00 bond, except that the bond refers only to moneys, revenues and property belonging to the Water Works Fund.

Both of the bonds were duly approved and accepted by the proper public officials, and after such approval and acceptance defendant McGlone entered upon the duties of said office.

Prior to McGlone's induction into office his predecessors in office had as such treasurer transmitted moneys from the Water Works Fund of the City and County to the banking house of Kountze Bros. in the City of New York. The reason such moneys were sent to New York was that the City and County had issued and sold negotiable municipal bonds, with coupons attached, payable semiannually, at the office of the treasurer of the City and County of Denver, or at the option of the holders of said securities, at said banking house in New York City. At the time McGlone became treasurer of the City and County of Denver there was on deposit with said banking house in New York City $219,832.50 of the moneys so sent to New York by the defendant McGlone's predecessor in office. McGlone, on becoming treasurer, receipted to his predecessor in office for this amount of money the same as if the money had been

turned over to McGlone in Denver. Thereafter, McGlone, as such treasurer, sent to said banking house for the purpose aforesaid, $80,000.00 from the Water Works Fund of the City and County of Denver. Thereafter, in October, 1931, said banking house failed, and eventually the bankruptcy court in New York City administered the assets of the bankrupt. At the time of the failure there was on deposit with Kountze Bros. the sum of $25,977.50, the amount of money so sent to New York which had not been paid out by Kountze Bros. to holders of the said negotiable bonds issued by the City and County of Denver.

After McGlone ceased being treasurer, the City and County of Denver brought this suit against McGlone and the Continental Company on said $500,000.00 official bond to recover said sum of $25,977.50. It also brought suit against McGlone and the Fidelity Company on said $100,000.00 bond to recover said amount of $25,977.50. Both suits were of course brought on the theory that the failure of Kountze Bros. did not release the defendant McGlone from accounting for and paying over to his successor in office the said amount of $25,977.50. After the said failure of Kountze Bros. the City and County of Denver filed in the New York bankruptcy court its claim for said amount, and it thereafter, on towit, January 15, 1939, received on its claim a liquidating dividend of $1,299.88, and on January 15, 1940 a further liquidating dividend of $2,111.52. The said suit brought on the $100,000.00 bond on which the Fidelity Company was surety was dismissed with prejudice by the plaintiff in consideration of the payment to the City and County by the Fidelity of the sum of $18,171.26, which amount was paid to the City and County on April 21, 1941.

The defendant McGlone was not guilty of any moral misconduct in connection with the remittance of moneys to New York. The moneys sent by him and his predecessor were sent with the approval and under the orders of the Board of Water Commissioners of the City and County of Denver, and the transaction was shown on the books of the treasurers. McGlone simply followed the course of conduct which had been followed prior to his induction into office. The question involved in this litigation, however, is whether or not under the undisputed facts there is legal liability on

the part of the defendants. The court is of the opinion that such legal liability exists, and so finds. Under the terms and conditions of the bond given by McGlone sued on in this case, and under the law as the court understands the law to be, it was the legal duty of the defendant McGlone, when he went out of office, to deliver to his successor in office the $25,977.50 hereinbefore mentioned, and this he did not do, nor has he since paid any part of that sum to the City and County. The failure of Kountze Bros. furnishes no legal excuse for such failure. In two cases heretofore decided by the Supreme Court of Colorado, public officers and the sureties on their official bonds have been held liable for moneys lost through the same failure of Kountze Bros.

Patterson et al. vs. People ex rel. Board of County Commissioners of the County of Weld (1935), 98 Colo. 86, 53 Pac. (2d) 1187;

People ex rel. Board of County Commissioners of the County of Jefferson, vs. Koenig et al., (1936), 99 Colo. 456, 63 Pac. (2d) 1235.

Defendants' counsel have ably contended that the rulings made by the Supreme Court in the cited cases do not govern this case, but in view of said cited cases and others along the same line, this court is compelled, in its judgment, to hold the defendants liable.

The court finds further, that the defendants are entitled to credit or deduction on account of the amounts received by the City and County as liquidating dividends, and the said amount received by the City and County from said Fidelity company.

The plaintiff is entitled, under the law, to interest. Counsel for the City and County have filed with the court a computation of the interest at six per cent, crediting the defendants with the payments hereinbefore mentioned, which computation shows the present liability on the part of the defendants to the City and County of Denver as principal and interest due from the defendants in the amount of $14,483.33, which computation and amount the court approves.

Judgment therefore is ordered to be entered in favor of the plaintiff and against the defendants for said amount of $14,483.33 and costs of the cause.

Motion for new trial is dispensed with.

Defendants are each allowed an exception to the rulings of the court and the judgment so to be entered.

The issuance of execution on the judgment is stayed for five days and for an additional twenty-five days, and time and until sixty days from this date is allowed the defendants to prepare and tender a reporter's transcript.

Done and signed in open court this fifth day of January, 1943.

By the Court: HENRY A. HICKS,
Judge.

EXHIBIT "C"

THE CHARTER PROVISIONS THAT CONFER THEIR AUTHORITY AND IMPOSE THEIR DUTIES UPON THE MANAGER OF REVENUE, EX-OFFICIO TREASURER AND BOARD OF WATER COMMISSIONERS, RESPECTIVELY.

Section 98, 1927 Edition:

(Section 4) There shall be, and hereby is, created a department of revenue, which shall have full charge and control of, exercise all powers, perform all acts and duties now required, or that may hereafter be required by the Constitution, or general laws of this state, to be exercised or performed by the county assessor and county treasurer, which shall include all powers and duties of the assessor and treasurer, heretofore performed by the commissioner of finance.

The manager of the department of revenue shall be the officer in full charge and control of said department, and shall devote his entire time to the duties of his office. (Charter Amendment, May 17, 1916.)

Section 99, 1927 Edition:

(Section 51) The treasurer shall receive, receipt for and keep the money of the city and county and pay out the same on warrants as herein provided. (Charter, March 29, 1904.)

Section 101, 1927 Edition:

(Section 53) He shall keep an account with each fund, special and general, and when a warrant is drawn on any particular fund it shall be paid out of that fund only. (Charter, March 29, 1904.)

Section 102, 1927 Edition:

(Section 54) No money shall be paid out by the treasurer for any purpose except upon warrants drawn upon him by the auditor unless otherwise provided by this charter • • • *Provided*, the treasurer may pay the interest and principal on bonded indebtedness including special improvement bonds as the same become due without a warrant having previously issued therefor. (Charter, March 29, 1904.)

Section 105, 1927 Edition:

(Section 57) The treasurer shall give a bond to the city and county with sufficient sureties, which sureties shall be responsible surety companies, to be approved by the mayor and council, in the sum of five hundred thousand dollars, and for such additional sum as the mayor and council shall require, conditioned as by the general statutes relating to bonds of county treasurers and as may be further required by ordinance, and for paying over to his successor in office all sums of money belonging to the city and county as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever, and all city and county property which may come into his hands.

The cost of said bond shall be borne by the city and county, to be audited, allowed and paid out of the treasury as provided for the payment of other general expenses. (Charter, March 29, 1904.)

Section 106, 1927 Edition:

(Section 58) The treasurer shall, with the approval of the mayor and auditor, select annually, or oftener if necessary, one or more banks or banking institutions in the city and county which shall pay the highest interest for the average current deposit of the city and county funds.

a bond to the city and county with such conditions and in such sum as may be determined by the mayor, auditor and attorney, but not less than the maximum amount which shall be on deposit at any time. The sureties shall be approved by the mayor, auditor and attorney, and shall be other than the surety on the treasurer's bond. • • • The surety on such bond shall be a responsible surety company. (Charter, March 29, 1904.)

Section 108, 1927 Edition:

(Section 221) All monies arising • • • from any other source whatsoever, which may be collected or received by any officer of the city and county, or any department thereof, in his official capacity, for the performance of any duty shall be paid into the treasury. No officer or person other than the treasurer shall pay out or disburse such moneys or any part thereof, except as herein otherwise provided. (Charter, March 29, 1904.)

Section 111, 1927 Edition:

(Section 234) The income and revenue paid into the treasury shall at once be apportioned to and kept in appropriate funds, and such money, including the several funds now in the treasury, shall not be used for any purpose other than that for which the same were raised, provided that surplus and unused money in any fund may during the fiscal year be transferred from one fund to another by ordinance only, except as otherwise provided in this charter. (Charter, March 29, 1904.)

Section 113, 1927 Edition:

(Section 236) The bonded indebtedness interest fund shall be kept and used only in the payment of interest annually accruing on bonded indebtedness.

The sinking fund shall be kept and used only in the purchase, payment and redemption of the bonded indebtedness of the city and county. (Charter, March 29, 1904.)

Section 297 B, 1927 Edition:

(Section 264 D) There shall be and hereby is created a non-political Board of Water Commissioners of five mem-

bers, to have complete charge and control of a water works system and plant for supplying the city and county of Denver and its inhabitants with water for all uses and purposes * * *.

The Board shall have and exercise all the powers of the city and county granted by the constitution and laws of the State of Colorado and by the Charter, in the matter of purchasing, condemning and purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting and operating a water works system and plant for all uses and purposes, and everything necessary, pertaining, or incidental thereto. * * * It shall have power in the name of the City and County of Denver to make and execute contracts necessary or incidental to the powers herein granted: and shall also in the name of the City and County of Denver institute and defend all litigation affecting its powers and duties or in relation to said water works system and plant and the property and rights connected therewith or incidental thereto. * * *

The Board shall make an itemized monthly statement of all moneys received and paid out by it and all indebtedness incurred, a copy of which it shall file with the Auditor of the City and County of Denver, and shall daily turn over to the treasurer of said City and County all money received.

The Treasurer of the City and County of Denver shall open and keep a separate account for said Water Works Fund into which shall be placed all revenues received from the operation of the Water Works system and plant together with all monies coming into said fund from other sources, and enter therein all receipts and disbursements on account thereof, and moneys shall be paid out of said fund only upon the warrants of the Board, audited by the Auditor of the City and County of Denver, except as to the bonds and interest thereon which the Treasurer shall pay without warrant or audit. * * *

The Treasurer shall give such additional bond conditioned in such manner as shall be determined by the Board, the premium therefor to be paid out of the Water Works Fund. * * *

The Auditor of the City and County of Denver shall • • • countersign and register all contracts.

A majority of the Board shall constitute a quorum, and all action by the Board shall be taken by a majority of the Board and not otherwise. (Amendment adopted, Aug. 6, 1918.)

(3756)